Supreme Court, U.S.
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No. 09-1204

IN THE
Supreme Court of the United States

CITY OF MILWAUKEE POST NO. 2874 VETERANS OF FOREIGN WARS OF THE UNITED STATES, *Petitioner*,

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE, *Respondent*.

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

There are two core issues presented in the Petition for Certiorari. The first issue deals with the controlling effect of *Boston Chamber of Commerce v. Boston*, 217 U.S. 189 (1910), a case discussed at some length by the courts below.[1] The second issue is the utter denial of due process to Petitioner Veterans of Foreign Wars (VFW) by allowing it to present *no testimony at all* regarding the value of the remaining century and a half of its lease in the building being condemned.

The Redevelopment Authority's Brief in Opposition barely mentions the first issue and wholly ignores the second.

To the extent that Respondent asserts that no federal issue was raised or decided below, the record is contrary. If nothing else, the number of basic 5th Amendment decisions of this Court relied on below (twelve in the majority and twenty in the dissent, plus Federal Circuit Court decisions in both) shows

[1] The Court of Appeals expressly followed this Court's *Boston Chamber* decision and held that the Wisconsin procedure was unconstitutional. (Pet. App. 96.) The Supreme Court analyzed *Boston Chamber*'s subsequent interpretation by this Court (Pet. App. 40-48), concluded that it was "not persuasive" (Pet. App. 41) and refused to follow it.

otherwise. (See *Oregon v. Kennedy* 456 U.S. 667, 671 [1982].)

The Petition presents a classic conflict of decisions in the state courts on an issue that should have a uniform constitutional base. As the Court has often said, the 5th Amendment provides a floor of protection that *all* states must provide, although they may provide more. (E.g., *Kelo v. City of New London*, 545 U.S. 469, 489 [2005]; *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676-677 [1923].)

This case takes the "undivided fee rule" into *reductio ad absurdum* territory. Respondent cites no case, for to the best of our knowledge there is none, in which the "undivided fee rule" was used not just to *reduce* a party's just compensation, but to *eliminate* it altogether. Whatever that may be, it is not the constitutionally mandated "just compensation."

I.

THE FEDERAL QUESTION WAS RAISED AND DECIDED.

It is a mystery how the Redevelopment Authority can say that the federal question was not raised. (Br. in Opp. 2.) Plainly, it was raised; *the Wisconsin Supreme Court expressly said it was.* (Pet. App. 40 [discussing VFW's

reliance on this Court's decision in *Boston Chamber*].) That should be the end of the matter, but there is more.

The Wisconsin Court of Appeals decided the case in VFW's favor because of its conclusion that *Boston Chamber* showed the undivided fee rule was unconstitutional on these facts. (Pet. App. 96.) That is the opinion that was being reviewed by the Wisconsin Supreme Court, which reversed and decided not to follow this Court's application of the 5th Amendment. (Pet. App. 41-48.) Its discussion necessarily examines *Boston Chamber* and some of this Court's decisions following *Boston Chamber* (particularly *Brown v. Legal Found. of Washington*, 538 U.S. 216 [2003] [Pet. App. 43-45] and *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999] [Pet. App. 44]) in concluding that it would disregard this Court's decisions in favor of its own.[2]

Where a state supreme Court opinion relies substantially on this Court's decisions (*Oregon v. Kennedy*, 456 U.S. 667, 671 [1982]), or where the state and federal decisions are "interwoven" so that it cannot be said that

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[2] Recall that two of the majority in this 4-3 decision separately concurred in order to make clear that "*our* precedent requires" the result. (Pet. App. 51; emphasis added.)

there is an adequate and independent state basis for the decision (*Michigan v. Long*, 463 U.S. 1032, 1040 [1983]), then the presence of a federal question is not open to doubt.

That would seem even more true here, where the Wisconsin court deliberately (1) analyzed, and then (2) rejected this Court's decisional law interpreting the 5th Amendment, before (3) substituting for that its own interpretation of Wisconsin's mirror image constitutional provision. If all any state court needed to do in order to "cert proof" its decision was to *say* it was relying wholly on such a mirror image provision, thereby evading this Court's settled determinations, then this Court's primacy in Federal Constitutional interpretation would be mortally undermined.

II.

STATE SUPREME COURTS ARE SPLIT ON THE CONSTITUTIONALITY OF THE UNDIVIDED FEE RULE.

As shown in the Petition, state court decisions have split three ways in evaluating the constitutionality of the undivided fee rule. All of these courts are measuring the rule against either the 5th Amendment or state constitutional mirror image provisions. Their

answers to the question whether the undivided fee rule is constitutional are either "yes," "no," or "it depends." (Pet. 11-17.) This crazy quilt is anything but what the Redevelopment Authority terms "a reasonably well-settled body of state law...." (Br. in Opp. 10.)

The Redevelopment Authority's assertion that none of the cases cited in the Petition held the undivided fee rule unconstitutional as a matter of federal constitutional law (Br. in Opp. 16) merely shows that the Authority failed to examine the cases cited in the Petition (even though it cited the same cases itself (Br. in Opp. 17-18). Those state cases show (1) some that relied on this Court's decisions and (2) others that rejected this Court's decisions, thus demonstrating the need for intervention and clarification now.

Arkansas, for example, rejected the undivided fee rule because it agreed with *Boston Chamber*. (*Arkansas State Highway Commn. v. Fox*, 322 S.W.2d 287, 289 [Ark. 1959].) Likewise, California, in rejecting a knee jerk application of the rule. (*People ex rel. Dept. Pub. Wks. v. Lynbar, Inc.*, 253 Cal.App.2d 870, 882 [Cal. App. 1967].) On the other hand, in adopting the undivided fee rule, Kansas simply dismissed this Court's jurisprudence under the rubric of "[f]or contrary holdings see...." (*Moore v. Kansas Turnpike Auth.*, 317

P.2d 384, 390 [Kans. 1957].) And in Nevada, *Boston Chamber* is relied on by the dissent, to show the error of the majority's ways. (*County of Clark v. Sun State Properties, Ltd.*, 72 P.3d 954, 964 [Nev. 2003].)

What the review of state cases shows is only that there is confusion in the application of the 5th Amendment to the undivided fee rule. It is time for this Court to intervene. Otherwise, the state-to-state chaos will continue, with states feeling free to comply or not with 5th Amendment jurisprudence when they choose to do so.

In fact, absolute application of the undivided fee rule (as practiced in Wisconsin) lends itself to precisely the abuse shown in this case: Milwaukee, by failing to enforce its own codes against the building owner and then refusing to allow any tenants besides VFW to occupy the building, caused the dilapidation that eventually served as its justification for a $0 value on the date of taking. And then, as the building was worth nothing, it used the undivided fee rule to provide no compensation to VFW, the victim caught between the city's lack of enforcement and its desire to have something else on the site.

Nothing in the Respondent's briefing can undercut the existence of the three-headed

(yes/no/maybe) state court disagreement as to the import of the 5th Amendment. Nor is there validity to the Redevelopment Authority's assertion that granting this Petition "would obliterate the distinction between state and federal constitutional law...." (Br. in Opp. 19.)[3] All that VFW asks of this Court is that it enforce the 5th Amendment as the "federal baseline," (*Kelo*, 545 U.S. at 489) beneath which states may not go.

III.

THE REDEVELOPMENT AUTHORITY IGNORES VFW'S DUE PROCESS RIGHTS HERE, AS IT DID BELOW.

The Redevelopment Authority confines the entirety of its due process argument to a footnote. (Br. in Opp. 21, n. 11.) That shrift is about as short as the Authority gave VFW in the proceedings below.

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[3] The Redevelopment Authority overlooks Art. 6 , cl. 2 of the U.S. Constitution, which makes that organic document "the supreme law of the land...anything in the Constitution...of any State to the contrary notwithstanding." Where there is a "distinction" between state law and the U.S. Constitution on the same point of law, the latter controls.

The argument is a bootstrap which only reinforces the need for this Court's review. To make this point, one cannot improve on the Respondent's own words:

> "Once the lower courts here decided that the unit [or undivided fee] rule was the applicable rule, *petitioner did not have a due process right to a jury hearing* to prove the value of the lease as something separate and distinct from the fee, since this was legally irrelevant." (Br. in Opp. 21, n. 11; emphasis added.)[4]

For once, VFW and the Redevelopment Authority are in agreement: the upshot of application of the undivided fee rule is that VFW's due process right to present evidence of value was made to vanish. But that is as far as the agreement goes. Respondent's position overturns this Court's jurisprudence (see Pet. 27-30), which may explain why none of the cases discussed there are mentioned in the

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[4] Thus, in Respondent's hands, the "undivided fee rule" acquires such magic potency that it eliminates not only the authority of this Court's directly on-point holding, but also a condemnee's due process right not to have its case disposed of without an opportunity to be heard and present evidence.

Brief in Opposition. The point was succinctly made by this Court in an eminent domain case nearly a century ago:

> "[I]t is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard." (*Bragg v. Weaver*, 251 U.S. 57, 59 [1919].)

The Redevelopment Authority's idea of due process is likewise laid out plainly in that footnote: what happened to VFW, says Respondent, was not only fair, but was also the logical upshot of applying the undivided fee rule:

> "[I]t is in the *apportionment* process that the lessee may introduce evidence about the value of its lease....However, because the jury in this case found that the fair market value of the property was $0, *there was no subsequent apportionment proceeding* and thus provision of evidence of the value of the leasehold was moot." (Br. in Opp. 21, n. 11; initial emphasis in original; final emphasis added.)[5]

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[5] Compare *Clayton v. County of Los Angeles*, 26 Cal.App.3d 390, 394-395, n. 6 (Cal.App. 1972),

Thus, the Redevelopment Authority's defense of the Wisconsin Supreme Court's award of $0 compensation is that the undivided fee rule not only made them do it, but application of that rule also caused any due process rights VFW may have possessed to vanish like smoke.[6]

If nothing else, Respondent's defense of the undivided fee rule — application of which caused the elimination of both due process and just compensation rights at a single blow — is a cry for this Court to grant certiorari.

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observing that it would be an absurdity for a court to substitute an apportionment proceeding for a valuation trial where the latter produces insufficient funds to compensate the owner of each property interest being taken.

[6] The Redevelopment Authority's appraisal assertions are nothing but *ipse dixit*. As revealed truth, the Redevelopment Authority asserts that "Five thousand two hundred fifty feet of space on the ground floor of an eleven-story Building cannot be worth more than the entire Building." (Br. in Opp. 22.) In fact, courts have come to precisely the conclusion derided by Respondent. (E.g., *State v. Platte Valley Pub. Power & Irr. Dist.*, 23 N.W.2d 300, 307-308 [Neb. 1946]; *City of Baltimore v. Latrobe*, 61 A. 203, 206 [Md. 1905]; see *Gallatin Housing Auth. v. Chambers*, 362 S.W.2d 270, 276 [Tenn. App. 1962] [applying *Bauman v. Ross*, 167 U.S. 548 [1897].)

CONCLUSION

The Brief in Opposition flags the central point directly: "the Wisconsin Supreme Court's decision was the product of adherence to 'Wisconsin's precedent.'" (Br. in Opp. 9.)

Just so. Wisconsin insisted on substituting its own precedent for this Court's precedent — all while ostensibly seeking to comply with the 5th Amendment's just compensation guarantee. Certiorari is needed to determine whether a state can dismiss this Court's precedent as "not persuasive," denying just compensation as well as eliminating a litigant's right to due process of law.

Respectfully submitted,

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